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No. 79-1734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

v.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA and WYOMING, IN SUPPORT OF PETITIONERS, *AMICI CURIAE*

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I.

QUESTION PRESENTED

Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983.[1]

[1]Although other issues are before this Court in the case at bar, this is the only question which will be addressed by the *amici curiae* in this brief.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska, granting respondent's motion for summary judgment, is unreported and appeared as Appendix B of petitioners' petition for a writ of certiorari. The affirmance of the District Court's opinion by the United States Court of Appeals for the Eighth Circuit is also unreported and appeared as Appendix C of petitioners' petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on January 29, 1980, and petitioners' motion for rehearing was denied by the court on February 29, 1980. The jurisdiction of this court was invoked by petitioners under 28 U.S.C. § 1254(1).

INTEREST OF AMICI CURIAE

The above-listed states, by and through their respective Attorneys General (see Appendix), respectfully offer the present brief as *amici curiae,* in support of the position of the petitioners in this cause. As the chief legal officers for their states, it is the duty of the Attorneys General to defend suits under 42 U.S.C. § 1983 against state officials and employees. For this reason, the *amici* have a substantial and continuing interest in cases such as that at bar which interpret 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. 42 U.S.C. § 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. Fourteenth Amendment, United States Constitution reads as follows:

"Section 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Nebraska under 42 U.S.C. § 1983, by a prisoner of the State of Nebraska to recover the value of certain hobby materials lost while they were being stored for the prisoner (Taylor) at the Nebraska Penal and Correctional Complex (NPCC), Lincoln, Nebraska. Named as defendants were Robert F. Parratt, Warden of NPCC and Francis Lugenbill, Hobby Manager at NPCC. The materials in question here were valued at $23.50. The case was submitted to the district court upon the plaintiff's motion for summary judgment and a stipulation of facts.

The hobby materials were mail-ordered by the prisoner in accordance with NPCC procedures. However, when the materials arrived at NPCC the plaintiff had been placed in disciplinary segregation (Adjustment Center) and was not entitled to receive them. The materials were receipted into the institution by an inmate hobby clerk and a civilian hobby counter employee. Neither the inmate hobby clerk nor the civilian employee were named as defendants in this case.

After being receipted into NPCC the materials were stored at the hobby center until Taylor was entitled to take possession of them. When Taylor attempted to claim the goods they could not be located.

The district court, upon consideration of the stipulated set of facts, entered summary judgment for the plaintiff against defendants Parratt and Lugenbill in the amount of $23.50. The district court, in its Memorandum Opinion, specifically held that "negligence can form the foundation for an action under section 1983." Having made that determination, the district court then entered a personal judgment against these two defendants although neither the record in this case nor the district court's opinion reflect any direct involvement in this matter by either defendant.

On appeal to the United States Court of Appeals for the Eighth Circuit, the judgment of the district court was summarily affirmed, and the defendants' motion for rehearing was denied.

SUMMARY OF ARGUMENT

It is the position of the *amici curiae* that acts of simple negligence by persons acting under color of state law do not constitute grounds for relief under 42 U.S.C. § 1983. This position is supported by the legislative history of § 1983, the recent decisions of this Court, and a substantial majority of the decisions in the lower federal courts.

To interpret § 1983 as applying to merely negligent acts, as opposed to intentional or wanton constitutional abuses, serves to upset the balance between the roles of state and federal courts by subsuming the body of state tort law within the federal system, encourages a glut of § 1983 suits, and does so without significantly furthering the policies underlying this statute. Because of the long-standing confusion among the judicial circuits on this issue, this Court should make a dispositive ruling on this question in the case at bar.

ARGUMENT

The sole question to be addressed in this brief is whether acts of simple negligence on the part of a person acting under color of state law may constitute grounds for relief under 42 U.S.C. § 1983. It is the position of the *amici curiae* that simple negligence, as distinguished from such standards of conduct as gross negligence and "deliberate indifference,"[2] does not and should not state a cause of action under § 1983, and that the case at bar presents both an opportunity and compelling support for a dispositive ruling to this effect.

I. The Current State of the Law

A. Legislative History

"Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia* v. *Carter,* 409 U.S. 418, 425 (1973). This statute, which was passed as the first section of the Civil Rights Act of 1871,[3] was drafted and enacted at the time of incipient anarchy and racial violence in parts of the South, and particularly in response to outrages perpetrated by the Ku Klux Klan; indeed, this enactment was generally known as the "Ku Klux Klan Act." See *Monroe* v. *Pape,* 365 U.S. 167, 171-180 (1961); *District of Columbia* v. *Carter, supra,* at 425-426. It is universally recognized that the controlling concern of this act's proponents was the inaction of state and local governments in controlling or deterring violence by the Klan and its sympathizers. As stated by Senator Pratt of Indiana during the debate on this legislation,

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[2]*Estelle* v. *Gamble,* 429 U.S. 97 (1976). This brief will not address the question of whether "gross negligence" is an appropriate basis for relief under § 1983.

[3]Ch. 22, 17 Stat. 13.

> "[O]f the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the doors of her temples."[4]

See also *Monroe* v. *Pape, supra,* at 175-176. As one commentator has noted,

> "The debates thus lay bare the background of the bill: Outlaws whipping, robbing and murdering with the tacit complicity (if not the active conspiracy) of those responsible for the enforcement of local police regulations."[5]

Thus, the conduct for which the Civil Rights Act of 1871 was intended to provide a remedy was *intentional conduct,* of the type classifiable either as crimes or intentional torts, which resulted in a deprivation of rights under the fourteenth amendment. Although some opponents of the Act expressed concern that the section now known as § 1983 might be read broadly to hold law enforcement officials liable "for a mere error in judgment,"[6] there is no indication whatever that the proponents of this section intended its application to other than intentional acts. Accordingly, it is clear that the legislative history of § 1983 does not support its use in cases involving or alleging mere negligence.

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[4]Cong. Globe, 42nd Cong., 1st Sess., at 317. For discussion of Klan violence, see *Id.* at 155-160, 320-322, 487.

[5]Shapo, "Constitutional Tort: *Monroe* v. *Pape* and Beyond," 60 Northwestern Univ.L.Rev. 277, 281 (1965).

[6]Cong. Globe, 42nd Cong., 1st Sess., at 365 (remarks of Rep. Arthur).

B. The Decisions of this Court

Although this Court has declined on at least two recent occasions to definitively rule upon the issue at bar,[7] the *amici* respectfully submit that the trend of decisions in this Court supports their view that allegations of simple negligence do not state a cause of action under 42 U.S.C. § 1983. This conclusion may be reached independently from two separate lines of decisions promulgated by this Court. The first such line of decisions are cases wherein this Court has indicated in various ways and to various degrees that negligence is a singularly inappropriate basis for § 1983 relief. In *Rizzo* v. *Goode,* 423 U.S. 362 (1976), the plaintiffs sought injunctive relief against the Philadelphia Mayor and supervisory police personnel on the theory that these officials had and violated a constitutional "duty" to eliminate police misconduct. In holding that relief was inappropriate, this Court stated that proof of a pattern of police misconduct was insufficient under § 1983; rather, it must be additionally shown that such misconduct was the result of a *deliberate policy* of the supervisory officials or flowed from an *intentional effort* to violate constitutional rights, citing language to this effect in *Allee* v. *Medrano,* 416 U.S. 802 (1974); and *Hague* v. *CIO,* 307 U.S. 496 (1939). *Rizzo* v. *Goode, supra,* at 374-375. Thus, it was held, "petitioners' *failure* to act in the face of a statistical pattern" (emphasis in original) did not constitute grounds for relief. By this holding, it would seem that this Court implicitly endorsed, at least in some subject-matter areas, the view urged by the *amici* herein.

A somewhat more definite statement on this matter came two months after *Rizzo,* in *Paul* v. *Davis,* 424 U.S. 693 (1976), wherein a plaintiff sought § 1983 relief for being placed on a published list of "active shoplifters"

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[7] *Baker* v. *McCollan,* 443 U.S. 137 (1979); *Procunier* v. *Navarette,* 434 U.S. 555 (1978).

shortly after his shoplifting charge had been dismissed. This Court held that the plaintiff's allegation, essentially a defamation claim, did not constitute a cause of action under § 1983, noting that the fourteenth amendment was not intended as "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. In dicta, concern was expressed that adopting the contrary view would mean, for example, that "survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle would . . . have claims equally cognizable under 1983." *Id.* at 698. By these statements, it would appear that this Court again recognized in *Paul* the undesirability of premising § 1983 liability on mere negligence.[8]

The last decision of this Court speaking directly to the negligence issue is *Estelle* v. *Gamble, supra,* in which it was held that allegations of negligence in the medical treatment of prisoners state at most a cause of action for malpractice cognizable in state courts and is not sufficient for a claim under § 1983. *Id.* at 107. The Court continued as follows:

> "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prison-

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[8]A reading of the dissenting opinion of Justice Brennan in *Paul* supports a conclusion that the dissent did not disagree with this aspect of the majority opinion; this dissent notes that "[t]he essential element of this type of § 1983 action is [an official's] *abuse of his official position*" (emphasis in original), citing *Monroe* v. *Pape, supra. Paul* v. *Davis, supra,* at 717. Clearly, to speak of "abuse" and "misuse of power" (*Id.* at 717) as essential elements of § 1983 is to exclude matters of negligence as grounds for relief. See the discussion of *Monroe* v. *Pape, infra.*

> er's serious illness or injury states a cause of action under § 1983. (citations omitted). *Id.* at 105-106.

Limited though this holding is to the subject of inmate medical treatment, the *amici* submit that it continues the trend of this Court's recent decisions toward a holding that more than simple negligence is required under 42 U.S.C. § 1983.

A second line of cases supporting the position of the *amici curiae* are those decisions which hold that a public official has a qualified immunity from damages in § 1983 actions when he acts in the good-faith belief that his conduct is constitutional. *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Procunier* v. *Navarette, supra.* Under these cases, the qualified immunity is breached only where the public official acted either with "malicious intent" to cause a constitutional deprivation or in disregard of "clearly established" constitutional rights of which he knew or reasonably should have known. *Wood* v. *Strickland, supra,* at 322. Clearly, the assertion of a subjective "good faith" standard is addressed solely to intentional conduct or deliberate omission. Moreover, the objective aspect of this test (that the official act pursuant to a reasonable belief in order to assert good faith) is also inconsistent with the concept of negligence, which by definition is unreasonable behavior because "[i]n the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. . . ." Prosser, *Law of Torts,* at 146 (4th ed. 1971).

The sole authority cited by the District Court below for its holding that mere negligence was sufficient to state a claim under § 1983, *Monroe* v. *Pape, supra,* does not support that court's conclusion. In *Monroe,* this Court dispensed with any requirement that the person being sued have a *specific* intent to violate the plaintiff's constitu-

tional rights, but a review of that case makes clear that the Court did not eliminate the need to show that the conduct engaged in was intentional. In stating that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Id.* at 187, *Monroe* was referring to its own facts showing intentional conduct by police officers which was so flagrant that they were bound to know that it would, as a "natural consequence," deprive plaintiffs of their constitutional rights.[9] This context of the above-quoted statement is made even clearer by the Court's statement that the enactment of § 1983 was designed to remedy the denial of constitutional rights "by an official's abuse of his position." *Id.* at 172. It is difficult to perceive an *abuse* of office as being anything other than intentional conduct. If so interpreted, *Monroe* is entirely consistent with this Court's present standard of good-faith immunity—that public officials are liable under § 1983 only if they act either with malicious intent or with deliberate indifference to clearly established rights of which they knew or clearly should have known. *Wood* v. *Strickland, supra.* Negligent conduct is not within such a formulation.

C. Decisions of the Lower Courts

"While most courts have been willing to allow section 1983 liability for gross negligence and deliberate indifference, there has been great reluctance to recognize simple negligence as a basis for a section 1983 claim."[10] Thus, decisions of virtually all judicial circuits support the position of the *amici curiae. Harper* v. *Cserr,* 544 F.2d 1121, 1124 (n.1) (1st Cir. 1976); *Williams* v. *Vincent,* 508 F.2d 541, 546 (2nd Cir. 1974); *Hampton* v. *Holmesburg Prison*

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[9]See McCormack, "Federalism and Section 1983," 60 Va.L.Rev. 1, 54-55 (1974).

[10]Kirkpatrick, "Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement", 46 Cinn.L.Rev. 45, 59 (1977).

Officials, 546 F.2d 1077, 1080-1082 (3rd Cir. 1976); *Jenkins* v. *Averett,* 424 F.2d 1228, 1232 (4th Cir. 1970); *Bogard* v. *Cook,* 586 F.2d 399, 411-412 (5th Cir. 1978), *cert. denied* 100 S.Ct. 173 (1979); *Bonner* v. *Coughlin,* 545 F.2d 565, 566-569 (7th Cir. 1976), *cert. denied,* 435 U.S. 932 (1977); *Williams* v. *Field,* 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied* 397 U.S. 1016 (1970); *McClelland* v. *Faceteau,* 610 F.2d 693, 696 (10th Cir. 1979); see also *Harvey* v. *Clay County Sheriff's Dept.,* 473 F.Supp. 741, 746 (W.D. Mo. 1979); *Schweiker* v. *Gordon,* 442 F.Supp. 1134, 1138-1139 (E.D. Pa. 1977); *Vun Cannon* v. *Breed,* 391 F.Supp. 1371, 1375 (N.D. Cal 1975).[11] *Contra: Howell* v. *Cataldi,* 464 F.2d 272, 279 (3rd Cir. 1972); *Parker* v. *McKeithen,* 488 F.2d 553, 556 (n.6) (5th Cir. 1974), *cert. denied* 419 U.S. 838 (1974); *Puckett* v. *Cox,* 456 F.2d 233, 234-235 (6th Cir. 1972); *Navarette* v. *Enomoto,* 536 F.2d 277, 281-282 (9th Cir. 1976), *reversed on other grounds sub nom. Procunier* v. *Navarette,* 434 U.S. 555 (1978), *on remand* 581 F.2d 202 (1978). The rationale generally discernible from these cases is that, as stated by this Court in *Paul* v. *Davis, supra,* § 1983 was not intended to replicate the whole of state tort law, but to remedy "abuses" by public officials and employees which might not be adequately remedied by the states. See *Harper* v. *Cserr, supra,* at 1124; *Bonner* v. *Coughlin, supra,* at 566-569. This rationale reflects the view of the *amici.*

II. Policy Considerations

As shown above, the legislative history of § 1983 and the clear trend of decisions supports the view that acts of simple negligence do not constitute grounds for relief under that statute, although this Court has so far declined

[11]It should be noted that, prior to the affirmance of the District Court opinion at bar, even the Eighth Circuit expressed misgivings about applying § 1983 as a remedy for acts of simple negligence. *Brown* v. *United States,* 486 F.2d 284, 287 (8th Cir. 1973).

to definitively rule to this effect. The *amici* would offer the following grounds in support of such a holding in the case at bar.

The clearest basis for the holding advocated by the amici rests in the principles of federalism and the relative powers and roles of the state and federal courts. As has been noted by this Court, § 1983 was not designed to be and should not be "a font of tort law" which swallows up the long-standing and thoroughly developed state legal systems of tort liability. *Paul* v. *Davis, supra,* at 701. To use § 1983 as a remedy for merely negligent acts, as compared to deliberate or wanton "abuses" by persons acting under color of state law, not only ignores this statute's intended function but ensures that any individual with a self-perceived grievance, no matter how accidental or trivial (so long as it may be denoted a violation of "due process"), may bypass the state courts and file his suit in the federal system. Not only does such an interpretation encourage a glut of § 1983 claims in the federal courts[12] (and a corresponding derogation of the state forum), but it does so utterly without the justification which originally supported this statute: it has not been contended, and it would be preposterous to allege, that state tort remedies are insufficient or that they are unavailable to persons alleging negligence by state officials or employees.

Nor may it be contended that including negligent acts within the § 1983 remedy significantly furthers the policies of that legislation. As made clear by the legislative history of and subsequent decisions regarding § 1983, it was pri-

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[12]In 1960, at the time of *Monroe* v. *Pape, supra,* only around 300 suits were filed under the general heading of civil rights; in 1974, some 8,000 such cases were filed. McCormack, *supra* at note 9, at 1. Clearly, the ability to recover attorney's fees under 42 U.S.C. § 1988 if they prevail has been and remains a strong incentive for litigants to bypass the state forum.

marily designed to deter abuses of constitutional rights by persons acting in the name of the state, when the deterrence of state law was insufficient or unused. While this statute continues to perform its deterrent function with regard to intentional or even gross and wanton misconduct, how can it be said to significantly "deter" acts of mere negligence? Permitting "civil rights" actions under § 1983 to go forward seeking money damages for negligent conduct against underpaid prison guards and administrators will not achieve penal reform. It may even have a reverse effect: capable personnel may leave or be discouraged from entering the correctional service.[13] As aptly observed in *Jenkins* v. *Meyers,* 338 F.Supp. 383 (N.D.Ill. 1972), *aff'd* 481 F.2d 1406 (7th Cir. 1973),

> "to apply the tort law en masse to § 1983 [by holding the defendant liable for an act of mere negligence] cannot meet with success. To do so would convert every minor mistake, especially in the milieu of the prison, into a violation of § 1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable." *Id.,* 338 F.Supp. at 390.

Finally, the *amici* would urge a holding by this Court that mere negligence does not constitute a § 1983 claim because of the existing confusion on this matter in the federal judicial circuits and district courts. To appreciate this confusion and its invidious effects, one need only consider that the allegations of respondent in the case at bar (that his hobby kit was negligently lost through the fault of petitioners) would state a cause of action in Missouri, as part of the Eighth Circuit subject to that court's decision at bar; would not state a cause of action in Illinois (*Bonner* v. *Coughlin, supra*); and would state a cause

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[13]Aldisert, "Judicial Expansion of Federal Jurisdiction," 1973 Law and Soc. O. 557, 565-566.

in the contiguous state of Kentucky (*Puckett* v. *Cox, supra*). This sort of confusion regarding a major issue in the application of § 1983 is undesirable and calls out for a resolution by this Court.

It has been argued by those in opposition to the position advanced by the *amici,* as well as those having concerns regarding any sweeping rules on this issue, that it is unreasonable to set a common standard of culpability for the many and varied constitutional rights and factual situations which might be involved in § 1983 litigation. It must be emphasized that *it is not the intent of the amici curiae to propose such a common standard.* Rather, it is respectfully submitted that mere negligence is never under any circumstances an appropriate basis for relief under § 1983, and that the exclusion of this standard from the range of those employed in § 1983 litigation will work no injustice and will serve to eliminate such relatively trivial lawsuits such as that at bar from the federal dockets.

CONCLUSION

In view of the foregoing, the *amici curiae* respectfully submit that the present cause should be reversed on the ground that allegations of mere negligence do not state a cause of action under 42 U.S.C. § 1983.

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ADDENDUM TO APPENDIX

Please note that the following states should be added to the list of the *amici curiae* contained in the Appendix to the printed brief:

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